IN THE

Supreme Court of the United States

OCTOBER TERM — 1944

NUMBER 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners-in-Certiorari

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of County Tax Assessors of Fulton County, and GUY MOORE, as Tax Receiver, and T. E. SUTTLES, as Tax Collector of Fulton County, Georgia,

Respondents-in-Certiorari

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more than others will pay more, and all who own less will pay less."

The property sought to be taxed is the intangible right of the contractors to receive from the United States Government the contract price for the work, labor and materials which "E. Jack Smith, an individual trading as E. Jack Smith, of the City of Atlanta in the State of Georgia, hereinafter called the contractor" agreed to furnish by documents appearing in the record (R. 20 and R. 32).

The incidence of the tax sought to be collected is upon the ownership by "E. Jack Smith, Contractor," a partnership, which is Petitioner-in-Certiorari, of the intangible right to receive this contract price.

The exact issue presented is whether this account receivable, privately owned and expressly subject to ad valorem tax by the laws of Georgia, enjoys an immunity because the person indebted (not the party sought to be taxed) is the United States Government.

As a basis for a proper consideration of this issue, we first present the historic and legal background for taxation in Georgia of this species of property.

2. Accounts Receivable Constitute Taxable Property and Are Subject to the Uniform Ad Valorem Tax under the Constitution and Laws of Georgia.

Attention has already been called to the fact that accounts receivable are not classified in Georgia but were expressly left by the Legislature in the great mass of unclassified property. (Section 2, Intangibles Classification Tax Act, Georgia Laws 1938, Extra Session, page 158.)

Not only are accounts receivable so taxable, but it has been the historic policy of the State of Georgia for almost a century to specify accounts receivable eo nomine as taxable property.

The present form of the General Tax Act in Georgia goes back to the Act approved January 9, 1852 (Georgia Laws 1851-2, page 288). Section II of this Act which was "An Act to Levy and Collect a Tax for each of the Political Years 1852 and 1853, and Thereafter until Repealed," provides:

> "The term 'personal estate' as used in this Act shall be construed to include all chattels, monies, debts due from solvent debtors — open accounts, goods, wares and merchandise," etc.

The 16th question contained in Section 833 of Volume I of the Code of Georgia of 1895, codified from the Act approved October 20, 1885, relating to returns of property for taxation (Georgia Laws 1884-5, page 28), required each taxpayer to answer the following question:

> "What is the gross value of your notes, accounts and other obligations for money and the market value thereof . . . ?" etc.

The 16th paragraph of questions required by Section 1087 of the Georgia Code of 1910 to be answered by taxpayers was as follows:

> "What is the gross value of the notes, accounts or other obligations for money and the market value thereof—whether the same are within or without the State?"

The Georgia Code of 1933 (which is the present Code) contains two (2) sections which refer specifically to ac-

counts receivable as taxable property in Georgia. They are the following:

Section 92-102 of the Code of 1933, defining the term "personal property" for purposes of taxation to include:

> "Monies, credits and effects, whatsoever they may be — money due on open account or evidenced by notes, contracts, bonds or other obligations secured or unsecured."

Also, question 5 of the questions required to be answered by every taxpayer in Georgia contained in Section 92-6215 of the Code of 1933, reading as follows:

> "What was the value on (January 1st) of all the notes and accounts — of every character and description owned or possessed by you?"

The recent unanimous decision of the Supreme Court of Georgia (October 8, 1943) in the case of *Colgate-Palmolive-Peet Company vs. Davis, Tax Assessor, et al.*, 196 Ga. 681, 27 S. E. 2d. 326, dealt exclusively with the taxability in Fulton County of accounts receivable and upheld the same tax now sought to be collected against an attack based upon the interstate commerce clause of the Constitution of the United States.

Directly in point is the last of the three (3) Armour Packing Company cases (*Armour Packing Company vs. Clark*, 124 Ga. 369, *Opinion 370*; 52 S. E. 145, 146, which is a unanimous decision of the Supreme Court of Georgia declaring the general tax statutes of Georgia to require the taxation in Georgia of notes and accounts owing to a non-resident conducting a business in the State.

The three sections of the Political Code of 1895 cited in this Armour Packing Company decision are identical with Sections 92-101, 92-102 and 92-105 of the current Code of 1933, except as changes have been made in Section 92-102 to incorporate the language of controlling Supreme Court decisions. The point made here is that the Supreme Court of Georgia interpreted these general tax statutes requiring taxation of all property and forbidding exemption of any, to demand the taxation of accounts receivable having a situs in Georgia.

However, the requirements of the Georgia Constitution are equally effective to require taxation of all property without resort to these special statutes.

Article VII, Section II, Paragraphs I and IV of the Constitution of 1877 (which is the present Constitution of Georgia) expressly requires the taxation in Georgia of all property and declares that "all laws exempting property from taxation other than the property herein enumerated shall be void." (Code of 1933, Sec. 2-5001 and 2-5005).

Suttles, Tax Collector vs. Northwestern Mutual Life Insurance Company, 193 Ga. 495, 19 S. E. 2d 396, was a unanimous decision of the Supreme Court of Georgia rendered February 16, 1942, applying these particular clauses of the Constitution of Georgia to require the taxation in Georgia of credits secured by real estate.

The exact language of the Georgia Supreme Court so applying these clauses of the Constitution of Georgia to credits secured by real estate (which are intangible property) is as follows:

"Thus apart from the permitted exemptions, the

Constitution evinces an intention that no property which is subject to taxation in this State shall be relieved therefrom, and the statutes quoted express with equal certainty an intention by the law makers to lay a tax upon all property of every kind of class which the State of Georgia has jurisdiction to tax, nothing excepted." (*Opinion 193* Ga. 506, 19 S. E. 2d, p. 403, col. 2, and page 404.)

This Northwestern Mutual decision related to an ad valorem tax for the taxable years 1931-1937, inclusive. While the Classification Tax Act (Georgia Laws 1937-8, Extra Session, page 156, supra) which became effective January 1, 1938, did classify credits secured by real estate (which were the species of property involved in the Northwestern Mutual litigation), this Classification Tax Act by its terms expressly left accounts receivable where the Constitution of 1877 and *Verdery vs. The Village of Summerville*, 82 Ga. 138, 8 S. E. 213, supra, placed them, that is, in the mass of taxable property required by the Constitution and the laws of Georgia to contribute their pro-rata part to the support of the Government which gives protection to their owners.

3. THE TAXATION OF PROPERTY OF A CONTRACTOR IS NOT FORBIDDEN BECAUSE OF THE EXISTENCE OF A CONTRACT BETWEEN THE CONTRACTOR TAXPAYER AND THE UNITED STATES GOVERNMENT.

It is not easy to find controlling cases relating to the taxation of accounts receivable, because very few States have left them unclassified.

Virginia vs. Imperial Coal Sales Company, Inc., 293 U. S. 15, 79 L. ed. 171, 55 S. Ct. 12,

related in part to an ad valorem tax on accounts receiv-

able challenged as an alleged burden on interstate commerce. The following portion of the Opinion of this Imperial Coal Sales Company case illustrates the equity of the State tax claim.

> "It is not the character of the property which makes it subject to such a tax, but the fact that the property has its situs within the State and that the owner should give appropriate support to the Government that protects it. That duty is not less when the property is intangible than when it is tangible." (*Opinion* 293 U. S. 20, 79 L. ed. 175, col. 2, 55 S. Ct., p. 14, col. 1.)

In a series of controlling decisions, the Supreme Court of the United States has upheld the right of a State and its political subdivisions to levy a non-discriminatory tax upon the business or the property or the profits of a contractor engaged in the performance of a contract with the United States Government.

Most authoritative and directly in point is the unanimous decision of the Supreme Court of the United States in

> *State of Alabama vs. King and Boozer* (decided November 10, 1941) 314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3, 140 A.L.R. 615.

There the Supreme Court of the United States *reversed* a decision of the Supreme Court of Alabama which had held invalid a two (2%) per cent sales tax laid on the gross retail sales price of tangible personal property sold to King and Boozer, a partnership, contractors having a contract with the United States Government for the construction of an Army camp.

Apart from the alleged constitutional restriction, the Supreme Court of Alabama found no want of authority in the taxing statute for the collection of this tax from the contractors. The Alabama Supreme Court had held this tax invalid for two reasons, namely:

(a) Because, in the opinion of the Alabama Court, the contractors were so related by their contract to the Government's undertaking to build the camp; and

(b) because, in the opinion of the Alabama Court, the contractors were so far acting for the Government in the accomplishment of the Government purpose,

that the tax was in effect "laid on a transaction by which the United States seeks the things desired for Government purposes."

The Supreme Court of the United States reversed the judgment on certiorari and *sustained the tax*.

In order to thoroughly understand the close analogy between the facts of this Alabama contractors' case and the case of "E. Jack Smith, Contractor," it will be well to compare the pertinent facts of the Alabama case with the facts of the case at bar as outlined in Part I of the briefs filed in this case.

This Alabama case involved a tax laid upon the seller as the "taxpayer," but required to be added to the sales price and collected by the seller from the purchaser. The contract in question was a "cost-plus-a-fixed-fee" contract and the articles in respect to which the two (2%) per cent sales tax was applied were sold for use by the contractor

in constructing an Army camp for the United States. Other points of analogy are set forth most clearly in an analysis of this Alabama case in an A.L.R. note (140 A.L.R., p. 625, col. 2 and p. 626, col. 1).

The Supreme Court of the United States rejected in its entirety the following arguments there advanced by the Government:

> (1) The argument that the tax was invalid because laid in such manner that, in the circumstances of the case, its legal incidence was on the Government rather than on the contractors who ordered the lumber and paid for it.
>
> (2) The argument advanced by the Government that it was in fact the purchaser.
>
> (3) The argument advanced by the Government that the cost-plus-a-fixed-fee feature of the contract, which required the Government to reimburse the contractor for the tax resulted in an infringement of Government immunity.

In connection with this reversal of the judgment of the Supreme Court of Alabama, we respectfully call attention to the fact that the King and Boozer contract was a "cost-plus-a-fixed-fee" contract. On the contrary, nothing in the present record indicates that the additional cost to the contractor (if any) was passed on by it to the Government. Accordingly, we consider the present case of E. Jack Smith, Contractor, to be a step further removed from Government interference than the King and Boozer case in which the contract itself added every item of expense to the cost that the Government agreed to pay.

Alabama vs. King and Boozer, 314 U.S. 1, supra, which

was a unanimous decision by eight (8) Justices, cited as authority *James vs. Dravo Contracting Company*, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A.L.R. 318, to which we shall now refer.

James vs. Dravo Contracting Company sustained a tax on the gross receipts of an independent contractor while engaged in the performance of a contract with the United States Government for the construction of locks and dams for the improvement of navigation.

The Supreme Court held that such an independent contractor was not an instrumentality of the Government and that as applied to such a contractor, a non-discriminatory State tax on his gross receipts from the contract is not unconstitutional as a tax laid on the contract itself or as otherwise directly burdening the Government.

Remembering that the case now before the Court is an ad valorem tax case, the following portion of the *Opinion* in *James vs. Dravo Contracting Company* is peculiarly pertinent:

> "The question of the taxability of a contractor upon the fruits of his services is closely analogous to that of the taxability of the property of the contractor, which is used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases, the taxes increase the cost of the work and diminish his profits. Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a Government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States." (*Opinion, James vs. Dravo Con-*

tracting Company, 302 U. S. 158, 82 L. ed. 169, col. 1, 58 S. Ct. p. 218, col. 1.)

That a decision sustaining a sales or a use tax upon a contractor having a contract with the Government would be authority in an ad valorem tax case relating to a tax on the contractor's property, is further established by the unanimous decision of the Supreme Court of the United States in

Trinity Farm Construction Company vs. Grosjean, 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469 (rehearing denied, 292 U. S. 604).

In this Trinity Farm Construction Company case the Supreme Court of the United States held that a contractor having contracts with the United States for the construction of river levees in a State was not a Government instrumentality. While the tax sought to be collected by Louisiana in the Trinity Farm Construction Company case was a sales or a use tax, nevertheless, the Supreme Court of the United States cited the instance of an ad valorem levy to support the use tax, the pertinent language of the Supreme Court of the United States being as follows:

> "Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power." (*Opinion 291, U. S. 472, 78 L. ed. 921, col. 2, 54 S. Ct. 470, col. 2.*) 58 S. Ct., p. 218, col. 1.

Curry vs. United States, 314 U. S. 14, 86 L. ed. 9, 62

S. Ct. 48, is likewise a *unanimous decision* relating to an Alabama excise tax of two (2%) per cent of the sale price, imposed with reference to storage, use, or other consumption in the State of tangible personal property purchased at retail by contractors having a "cost-plus-a-fixed-fee" contract with the United States. The tax was assessed in respect of a quantity of roofing which the contractors purchased outside the State and caused to be shipped to a camp site within the State of Alabama where it was used by the contractors in the performance of their construction contract with the United States Government.

Holding that the contractors "in purchasing and bringing the building material into the State and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government," the United States Supreme Court said:

> "If the State law lays the tax upon them (that is, the contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through the operation of the contract. . . . the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." (*Opinion 314*, U. S. 58, 86 L. ed. 11, 62 S. Ct. 48.)

Silas Mason Company, et al. vs. Tax Commissioner of Washington, et al. (decided December 6, 1937) 302 U. S. 186, 82 L. ed. 187, 58 S. Ct. 233, related to a State Tax

on gross receipts from construction work performed by a contractor under contract with the United States for the construction of a part of the Grand Coulee Dam and Power Plant.

Two questions were presented by the record, namely, (1) whether the tax imposed an unconstitutional burden upon the Federal Government, and (2) whether the areas in which the contractor's work was performed was within the exclusive jurisdiction of the United States.

With respect to this first question, namely, the question as to whether an unconstitutional burden was imposed on the Federal Government, the tax was sustained on authority of *James vs. Dravo Contracting Company*, 302 U. S. 134, supra.

Atkinson, et al. vs. State Tax Commission of Oregon, 303 U. S. 20, 82 L. ed. 621, 58 S. Ct. 419, related to a State income tax imposed by the State of Oregon upon the net income of Guy F. Atkinson and another, co-partners doing business as Guy F. Atkinson Company, which income was derived from work performed in the construction of the Bonneville Dam on the Columbia River under contract with the United States.

The contractor contended that the State law laid an unconstitutional burden on the Federal Government, and this contention was denied on the authority of cases cited in this section of this brief. (Opinion 303, U. S. 21, 82 L. ed. 623, 58 S. Ct. 419, col. 2.)

The Supreme Court of the United States (295 U. S. 715, 79 L. ed. 1671, 55 S. Ct. 646) *denied certiorari* to the decision of the Oregon Supreme Court in the case of *General Construction Company vs. Fisher* (1934) 149

Ore. 84, 39 P. 2d. 358, 97 A.L.R. 1252, which upheld a State excise tax of five (5%) per cent on the net income of a corporation derived from a contract with the United States Government for the construction of a dam and irrigation works in connection with the Owyhee Irrigation project. The Oregon Supreme Court decision said in the closing paragraph of this Opinion, (149 Ore. 92, 39 P. 2d 362):

> "The weight of authority would indicate that a corporation contracting with the United States or the State as an independent contractor for gain cannot claim immunity from taxation by reason of the furnishing labor and services either to the United States or the State, unless some statute specifically exempts such contractor from taxation in regard to the particular contract involved."

Upon the immediate questions presented in this case, the Supreme Court of Oregon, said:

> "The principle of immunity from State or local taxation of the property and instrumentalities of the United States is generally based upon the direct ownership or use and control of the property by the United States. Such immunity does not extend to the property of an independent contractor for gain, even should it be used in carrying out a contract with the United States." (Opinion, 149 Ore. 90, 39 P. 2d. 361, 97 A.L.R. 1256.)

Certiorari to this Oregon decision was denied for want of a substantial Federal question. (295 U. S. 745, supra.)

Recently the Supreme Court of the United States in the case of

United States, et al. vs. Allegheny County, Pa., 321

U. S. 88 L. ed. (*Adv. Opinions*) p. 845, 64 S. Ct. 908 (decided 5-1-44)

denied the right of the State of Pennsylvania to impose an ad valorem tax upon a property of the United States Government which had been leased to Mesta Machine Company and used by it as lessee in the performance of a contract with the United States Government.

The Supreme Court of the United States called attention to the following things:

1. That the tax sought to be collected was not against the leasehold interest, *and*

2. the Court distinguished cases relating to the property or earnings of the independent contractor in the following language:

> "The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity but without impairing the immunity of the State or the Nation itself.
>
> "Benefits which a contractor received from dealings with the Government are subject to State income taxation. Salaries received from it may be taxed. The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor. But, in all of these cases, what we have denied is immunity for the contractor's own property, profits or purposes." (*Opinion 64*, S. Ct. 915.)

Another ad valorem tax case was the United States Supreme Court decision (April 22, 1912) in the case of *Samuel D. Gromer, Treasurer of Porto Rico vs. Standard Dredging Company*, 224 U. S. 362, 56 L. ed. 801, 32 S. Ct. 499.

That case related to a local ad valorem tax upon machinery and boats in use in the harbor of San Juan, Porto Rico, in the performance of a dredging contract with the United States. The question is tersely stated in the first sentence of the Opinion of the United States Supreme Court in the following language:

> "The question in the case is the power of Porto Rico to tax certain machinery and boats which, at the time of the levy of the taxes, were in the harbor of San Juan, engaged in dredging work, in pursuance of a contract of the Standard Dredging Company with the United States Government."

Coming immediately to the point here urged by E. Jack Smith, Contractor, the United States Supreme Court said:

> "There is an allegation in the bill that the property was not 'subject to any lien or burden of taxation while being employed in the performance of its said contract with the United States of America and within the said harbor area.' It is not clear what is meant by the allegation. So far as it means that the property is an instrument of the national government, and not subject, therefor, to local taxation, the contention cannot prevail." (*Opinion 224*, U. S. 371, 56 L. ed. 805, col. 2, 32 S. Ct., p. 502, col. 2.)

Another *unanimous decision* in an ad valorem tax case is the decision of the Supreme Court of the United States in

> *Baltimore Shipbuilding and Dry Dock Company of Baltimore City vs. Mayor and Council of Baltimore* (November 28, 1904) 195 U. S. 375, 49 L. ed. 242, 25 S. Ct. 50.

This Baltimore case related to the taxability of land which formerly belonged to the United States, as a part of the property known as Fort McHenry and later conveyed to the Baltimore Dry Dock Company upon the condition that the Dry Dock Company should construct a dry dock upon the land and should "accord to the United States the right to the use forever of said dry dock at any time for the prompt examination and repair of vessels belonging to the United States," etc.

Upon the question of tax exemption of this land to the Dry Dock Company as an agent or instrumentality of the United States, the Supreme Court of the United States said in the last paragraph of the *Opinion*:

> "It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time." (*Opinion* 195, U. S. 382, 49 L. ed. 245, 25 S. Ct. 52.)

4. The Tax Sought to be Collected is Non-Discriminatory.

In the second division of this argument (pages 7-11, supra), we have called attention to the fact that the tax sought to be collected is the uniform ad valorem tax required to be paid by all taxpayers subject to tax in Georgia.

With respect to non-discriminatory State taxation, the Supreme Court of the United States recently said in the case of

Oklahoma Tax Commission vs. U. S. (June 14, 1943)

319 U. S. 598, *Opinion 610*, 87 L. ed. 1612, *Opinion 1620*, 63 S. Ct. 1284, *Opinion 1289, col. 2:*

". . . Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?' The Cherokee Tobacco, supra, 11 Wall., p. 621, 20 L. ed. 227.

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves vs. New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A.L.R. 1466, permitted States to impose income taxes upon government employees and *Helvering vs. Gerhardt*, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427, permitted the federal government to impose taxes on state employees. *O'Malley vs. Woodrough*, 307 U. S. 277, 59 S. Ct. 838, 83 L. ed. 1289, 122 A.L.R. 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering v. Mountain Producers Oil Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, repudiated former decisions seriously limiting state and federal power to tax. See, also, *Metcalf & Eddy vs. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384; *Jaines vs. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A.L.R. 318. The trend of these cases should not now be reversed."

If the tax sought to be collected were a discriminatory tax imposing upon property in which the Government had an interest a rate of tax higher than imposed upon other similar property in which the Government has no interest, then the rule should be different.

Compare: *In re Kentucky Fuel and Gas Corp.*, 127 F. 2d, 656, *Opinion 660*, col. 2.

5. CASES RELATING TO INTEREST-BEARING SECURITIES DISTINGUISHED.

Petitioners-in-Certiorari have cited and rely extensively upon *Banks vs. Mayor*, 74 U. S. (7 Wall.) 16, 19 L. ed. 57, and *Weston vs. The City of Charleston*, 27 U. S. (2 Peters) 449, 7 L. ed. 481, both of which cases relate to interest-bearing securities issued by the Federal Government.

There is a sound reason for according exemption to interest-bearing securities of the Federal and State Governments and their political subdivisions. In order to interest investors in the purchase of Government securities which yield a small income and to preserve the market for these securities which, in the public interest, must be supported, courts have generally held that the principal and the income from governmental interest-bearing securities must be tax-free.

All cases recognize a material distinction between privileges which must be accorded of necessity to guarantee and to maintain the borrowing power of the Government and the Government's obligation to pay to an independent contractor the contract price for a particular job. Such a contractor, with fixed charges which include whatever liability for taxes his particular State may impose, enters into a competitive market and makes a bid to do a particular job for a particular contract price. Some contracts between contractors and the Government have incorporated a cost-plus-a-fixed-fee feature. However, it does not appear that either of the two (2) contracts signed by "E. Jack Smith, Contractor" required compensation on any cost-plus basis.

The reason why a tax should be imposed in this kind of case and why Government bonds and the income therefrom should be exempt from tax is ably expressed by the Supreme Court of the United States in *James vs. Dravo Contracting Company*, *Opinion 302, U. S. 152, 153*, in the following language:

> "... There is no ineluctable logic which makes the doctrine of immunity with respect to government bonds applicable to the earnings of an independent contractor rendering services to the Government. That doctrine recognizes the direct effect of a tax which would operate on the power to borrow before it is exercised' (*Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673) and which would directly affect the Government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the Government to investors in its securities and its ability to maintain its credit,—considerations which are not found in connection with contracts made from time to time for the services of independent contractors."

The necessity for applying this rule to "stocks, bonds and securities of the United States" is expressed by the Supreme Court of the United States in its unanimous decision in the case of

> *Bank of Commerce vs. New York City* (decided December term 1862) 67 U. S. (2 Black) 620, 17 L. ed. 451.

In this Bank of Commerce case, the Supreme Court of the United States analyzed the reason for its decision in *Weston vs. The City of Charleston* in the following language:

"The tax upon the stocks was regarded as a tax upon the exercise of the power of Congress 'to borrow money on the credit of the United States.' The exercise of this power was interfered with to the extent of the tax imposed by the city authorities, that the liability of the certificates of stock to taxation by a State in the hands of an individual affected the value in the market, and the free and unrestrained exercise of the power." (*Opinion 67*, U. S. 631.)

Metcalf and Eddy vs. Mitchell, 269 U. S. 514, 70 L. ed 384, 46 S. Ct. 172, related to the tax status of a contractor's compensation for services rendered to a political subdivision of a State. The Supreme Court of the United States in a unanimous decision held that the contractor's earnings were subject to Federal income tax.

With respect to this Metcalf and Eddy case and its importance as a line of demarcation between a contractor's compensation and Government securities, the United States Supreme Court in its *Opinion* in *James vs. Dravo Contracting Company*, 302 U. S. 134, *Opinion 156*, said:

"That was a pivotal decision, and we had to meet the question whether the earnings of the contractor stood upon the same footing as interest upon Government securities or the income of an instrumentality of the Government. It is true that the tax was laid upon net income. But if the tax upon the earnings of the contractor had been regarded as imposing a direct burden upon a Government agency, the fact that the tax was laid upon net income would not save it under the doctrine of *Gillespie vs. Oklahoma*, 257 U. S. 501."

6. Analysis and Classification of Types of Cases

WHERE EXEMPTION HAS BEEN ACCORDED BECAUSE OF GOVERNMENT RELATIONSHIP.

In our opinion, it will be helpful to the Court to incorporate a brief analysis which illustrates the types of cases where tax exemption has been accorded because of Government relationship and the reasons therefor.

These cases fall naturally into five (5) groups as follows:

First. Cases where the incidence of the tax is directly upon the Government.

Such cases include ad valorem tax cases levying a tax upon Government property.

United States vs. Allegheny County, 321 U. S., 88 L. ed. (*Adv. Opinions*) p. 845, 64 S. Ct. 908.

This class likewise includes sales taxes upon sales made directly to the Government.

Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857, 48 S. Ct. 451, 56 A.L.R. 583.
Graves vs. The Texas Company, 298 U. S. 393, 80 L. ed. 1236, 56 S. Ct. 818.

With respect to these sales tax cases, involving sales directly to the United States, the Court's attention is respectfully called to the fact that they were either overruled, or their application restricted by the recent unanimous decision of the United States Supreme Court in the case of

State of Alabama vs. King and Boozer, 314 U. S. 1, supra.

Much controversy has existed as to whether these sales tax cases were expressly overruled or whether their ap-

plication was limited by the King and Boozer decision. (See Comment in case note 140 A.L.R., page 630.)

Second. Cases based upon special acts of Congress which, pursuant to some delegated power of Congress, has declared the particular property to be tax exempt. These cases include:

Bank vs. Supervisors, 74 U. S. (7 Wall.) 26, 19 L. ed. 60, based upon Title 31, Section 742, U. S. Code. (See Historical Note, U.S.C.A.)

Federal Land Bank vs. Crossland, 261 U. S. 374, 67 L. ed. 703, 43 S. Ct. 385, based upon the Federal Farm Loan Act of 1916.

Pittman vs. Home Owners' Loan Corporation, 308 U. S. 21, 84 L. ed. 11, 60 S. Ct. 15, 124 A.L.R. 1263, based upon the terms of the Home Owners' Loan Corporation Act (12 U.S.C., Section 1463.)

Federal Land Bank of Columbia vs. State Highway Department, 172 S. C., 174, 173 S. E. 284, based upon Title 12, U. S. Code, Section 931.

Third. Cases relating to the taxability of certificates of indebtedness, Government bonds or Government stocks and other interest-bearing securities of the Federal or the State Government, or the municipalities thereof.

Banks vs. Mayor, 74 U. S. (7 Wall.) 16, 19 L. ed. 57.

Bank of Commerce vs. New York City, 67 U. S. (2 Black) 620, 17 L. ed. 451.

Weston vs. The City of Charleston, 27 U. S. (2 Peters) 449, 7 L. ed. 481.

Pollock vs. Farmers' Loan and Trust Co., 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673.

Fourth. Tax cases where exemption has been accorded

because of the special trust relationship between the United States and its Indian wards.

Indian Territory Illuminating Oil Co. vs. Oklahoma, 240 U. S. 522, 60 L. ed. 779, 36 S. Ct. 583.

Gillespie vs. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171.

A brief and comprehensive analysis of the tax treatment of Indian lands is found in the case of

Dewey County vs. United States (C.C.A. 8th 5-21-38), 26 F. 2d, p. 434, *Opinion* 435.

Recent comprehensive analysis by the United States Supreme Court of the nature of the guardianship exercised by the United States over its Indian wards, including the necessary tax exemption of Indian lands as a government "instrumentality", is found in the case of

Board of County Commissioners of Creek County, et al. vs. Seber, et al. (decided April 19, 1943) 318 U. S. 705, *Opinion 717*, 87 L. ed. 1094, *Opinion 1104*, 63 S. Ct. 920, *Opinion 927, col. 1.*

Fifth. The Telegraph Company decisions illustrate the distinction for which the County contends and do not constitute a separate group. Telegraph companies are authorized by special Act of Congress (Title 47 U.S.C.A., Sections 1, 2 and 3) to exercise a special franchise granted to them by the United States Government. This franchise is granted by Congress upon certain considerations whereby the Government receives from telegraph companies certain special privileges in return. As a result of this special Government franchise, the States have been forbidden to impose upon such telegraph companies a

franchise tax, which would constitute a direct tax upon their right to operate, as distinguished from property acquired as a result of such operations.

Western Union Telegraph Co. vs. Wright (C.C.A. 5th, 10-3-10) 185 F. 250.

But, even though exercising this special franchise by grant from Congress, *the real and personal property of such companies* is subject to State property taxes in the same manner as all other taxable property.

Western Union Telegraph Co. vs. Massachusetts, 125 U. S. 530, 31 L. ed. 790 8 S. Ct. 961.

Western Union Telegraph Co. vs. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 S. Ct. 1054.

Both the Taggart and Massachusetts cases relate to ad valorem taxes, which are taxes of the kind now sought to be collected in this case. They are distinguished in the Georgia case (*Western Union Telegraph Co. vs. Wright*, 185 F. 250, supra) from the franchise taxes which alone are forbidden.

7. Definition of Government Instrumentality.

From the above analysis, we arrive at the following definition of a "government instrumentality" which we believe embraces every species of property entitled to exemption under the authorities cited in the brief of either party to this case:

(1) Property which is government owned, either in its proprietary capacity or title to which is vested in the Government for some special purpose, such as its Indian wards.

(2) Property which either Congress or the State

Legislature has, pursuant to Constitutional authority, declared tax exempt.

(3) Cases relating to interest-bearing securities, or evidences of debt, issued by the Federal Government or a State government or the municipalities thereof.

Such public securities generally represent the long term or funded debt of the Government, and tax exemption is accorded of necessity to preserve the borrowing power of the Government and a market for its securities.

CONCLUSION

The tax history and authorities cited in this argument establish, in our opinion, the fact that the property of E. Jack Smith, Contractor, privately owned, is in the same class as all other unclassified property which is subject to tax according to the Constitution and laws of Georgia. The gist of the issue here presented is the fact that the property sought to be taxed is privately owned, that the tax situs for this property is Fulton County, and that the tax is not discriminatory. As pointed out in the opening paragraphs of this brief, Petitioners' statement of the issue ignores these controlling facts.

This restatement of the issue by Respondents-in-Certiorari places the emphasis where the emphasis belongs, that is, upon the private ownership of the property sought to be taxed and the contractor's obligation to pay his

equal share of the tax burden according to the Constitution and the laws of his State.

Respectfully submitted,

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